

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CARL DAVID, a/k/a ROBERT CARL
DAVIDS,

Defendant-Appellant.

UNPUBLISHED

November 18, 2010

No. 291537

Wayne Circuit Court

LC Nos. 08-009464-FC;

08-016840-FC

Before: O'CONNELL, P.J., and BANDSTRA and MURRAY, JJ.

PER CURIAM.

Defendant was charged with several counts of criminal sexual conduct ("CSC") in two separate cases, each involving a different victim under the age of 13. The cases were consolidated for trial. In LC No. 08-009464-FC, defendant was convicted by a jury of one count of first-degree CSC, MCL 750.520b(1)(a), and two counts of second-degree CSC, MCL 750.520c(1)(a). In LC No. 08-016840-FC, the same jury found defendant guilty of one count of first-degree CSC, MCL 750.520b(1)(a). Defendant was sentenced to concurrent prison terms of 25 to 60 years for each first-degree CSC conviction, and 3 to 15 years for each second-degree CSC conviction. He appeals as of right. We affirm.

Defendant was convicted of sexually abusing two underage female foster children while they were living in the home that defendant shared with his wife. Defendant was convicted of two counts of sexual contact and one count of digital penetration involving JB, who was approximately nine years old at the time of the incidents. Defendant was also convicted of engaging in cunnilingus with DJ, who was approximately 11 or 12 years old at the time.

I. ADMISSIBILITY OF OTHER-ACTS EVIDENCE

Defendant raises several issues challenging the admissibility of each victim's allegations of sexual abuse in the case involving the other victim. We conclude that the evidence was admissible under MCL 768.27a, that the evidence was not subject to exclusion under MRE 403, and that defendant's constitutional challenges to the validity and application of MCL 768.27a are without merit.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). Any preliminary questions of law are reviewed de novo. *Id.*

MCL 768.27a provides:

(1) Notwithstanding section 27, [MCL 768.27] in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

(2) As used in this section:

(a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.

(b) "Minor" means an individual less than 18 years of age.

Included within the definition of "listed offense" in MCL 28.722 are acts that constitute either first-degree CSC, MCL 750.520b, or second-degree CSC, MCL 750.520c. MCL 28.722(e)(x). See also *People v Watkins*, 277 Mich App 358, 364; 745 NW2d 149 (2007). Because the other-acts evidence in this case involved sexual acts against a minor, which would constitute acts of first- or second-degree CSC, they qualify as listed offenses for purposes of MCL 768.27a. Thus, the evidence of defendant's other acts of sexual abuse was admissible under MCL 768.27a, and the evidence could be "considered for its bearing on any matter to which it is relevant."¹ Indeed, defendant does not dispute that the other-acts evidence qualifies for admission under that statute. Instead, defendant argues that, notwithstanding MCL 768.27a, the evidence should have been excluded under MRE 403 because it was unduly prejudicial. He also argues that MCL 768.27a is unconstitutional because it violates the separation of powers provision in Const 1963, art 6, § 5, and because application of the statute violates the Ex Post Facto Clause of the federal and state constitutions, US Const, art 1, § 10; Const 1963, art 1, § 10.

¹ Although plaintiff discusses the admissibility of the evidence under MRE 404(b), because the other-acts evidence involves "listed offenses" under MCL 28.722, any analysis should begin with MCL 768.27a. See *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009) ("where listed offenses are at issue, the analysis begins and ends with MCL 768.21a"). See also *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008) (evidence that a defendant committed other acts of criminal sexual conduct against a minor may be admitted under MCL 768.27a, independent of MRE 404[b]).

This Court has previously considered and rejected defendant's constitutional challenges to MCL 768.27a. In *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007), this Court held that MCL 768.27a does not invade the Supreme Court's exclusive rulemaking authority because it is a substantive rule of evidence that does not principally regulate the operation or administration of the courts. See also *People v Wilcox*, 280 Mich App 53, 54-55; 761 NW2d 466 (2008), rev'd on other grounds 486 Mich 60 (2010), and *Watkins*, 277 Mich App at 362-365. The Court in *Pattison*, 276 Mich App at 618-619, also held that application of MCL 768.27a does not violate the Ex Post Facto Clause, because it does not lower the quantum of proof or value of the evidence needed to convict a defendant. See also *Wilcox*, 280 Mich App at 54-55. Accordingly, there is no merit to defendant's constitutional challenges to MCL 768.27a.

We now turn to defendant's argument based on MRE 403. Evidence that is admissible under MCL 768.27a is subject to exclusion under MRE 403. See *Pattison*, 276 Mich App at 621. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Although the other-acts evidence in this case was prejudicial in the sense that it was damaging to defendant, "unfair prejudice" for purposes of MRE 403 does not mean any prejudice, but rather refers to "the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994), quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984).

Defendant contends that a lack of similarity between the sexual acts against each victim supports excluding the evidence under MRE 403. But as this Court explained in *Watkins*, 277 Mich App at 365, "similarity is simply an inapposite consideration under MCL 768.27a." The alleged lack of similarity is simply not a basis for concluding that the evidence was unfairly prejudicial. Defendant also argues that the evidence should have been excluded under MRE 403 because of its tendency to bolster the credibility of each victim concerning the alleged sexual abuse. However, that is a permissible purpose of the evidence. Evidence offered under MCL 768.27a properly can be used to show a defendant's propensity to commit criminal sexual behavior against a minor. *Pattison*, 276 Mich App at 619-620. Thus, use of the evidence for this purpose does not implicate MRE 403 by injecting considerations extraneous to the merits of the case. Defendant has not shown that the other-acts evidence should have been excluded under MRE 403.

Lastly, although defendant also argues that the other-acts evidence was not admissible under MRE 404(b), because the evidence involves "listed offenses" under MCL 28.722, the admissibility of the evidence is governed by MCL 768.27a, and it is unnecessary to consider MRE 404(b). *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009); *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence of penetration to support his conviction of first-degree CSC against JB. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction does not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court reviews the evidence in a light most favorable to the prosecution. *Id.* at 514-515. This Court will not interfere in the trier of fact's role in determining the weight of evidence or the credibility of witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A person is guilty of first-degree CSC if he engages in sexual penetration with a person under the age of 13 years. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). MCL 750.520a(r) defines "sexual penetration" as

sexual intercourse, cunnilingus, fellatio, anal intercourse, *or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body*, but emission of semen is not required.
[Emphasis added.]

The prosecution need only show penetration of the genital opening, not the vagina, and touching of the labia majora is sufficient to establish penetration. *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981). The victim's testimony alone can provide sufficient evidence to support a conviction. See *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), *aff'd* 450 Mich 349 (1995), amended 450 Mich 1212 (1995).

JB's testimony describing how defendant touched her "private part" with his finger, and explaining that defendant would move his finger and that this made her feel strange, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find that defendant penetrated JB by touching her clitoris with his finger for purposes of sexual gratification. Thus, there was sufficient evidence of penetration to support defendant's conviction. Furthermore, contrary to what defendant asserts, we found nothing inconsistent between the prosecutor's closing argument and the testimony at trial. The prosecutor's comments properly were based on the evidence and reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

III. JURY INSTRUCTION ON PRIOR INCONSISTENT STATEMENTS

Defendant next argues that the trial court erred when it instructed the jury on the use of prior inconsistent statements. Although the court instructed the jury consistent with CJI2d 4.5, it tailored the instruction to refer only to a prior inconsistent statement involving whether JB ever told someone that she had been hit with a belt. Defendant argues that the instruction also should have referred to a statement by JB to a protective services worker regarding the number of times she was sexually assaulted by defendant.

"[A] trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Here, we find no abuse of discretion. As the trial court found, JB told the Protective Services worker that the only inappropriate touching that occurred was what JB had already reported to defendant's wife. JB told defendant's wife, consistent with JB's trial testimony, that

the abuse occurred too many times to count. Thus, there was no showing that JB made a prior inconsistent statement with respect to this matter. Accordingly, we find no instructional error.

IV. THE JURY'S REQUEST TO REHEAR TESTIMONY

Shortly after the jury began deliberations, it asked to rehear the testimony of both victims. Defendant now argues that the trial court erred by refusing to grant the jury's request, and that the trial court's instructions in response to the jury's request require reversal. Because defendant did not object to the trial court's jury instructions, our review of the instructional issue is limited to plain error affecting defendant's substantial rights. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003).

A defendant does not have an absolute right to have a jury rehear testimony. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). When a jury asks to rehear testimony, both the decision whether to provide the testimony and the extent of the reading is within the sound discretion of the trial court. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). MCR 6.414(J) requires that the trial court "exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." The rule also provides that the court may order the jury to continue deliberations without the requested testimony, "so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." *Id.*

In this case, the trial court did not abuse its discretion by initially refusing to provide the requested testimony. The request was unreasonable because it was made approximately 15 minutes after the jury began deliberations. Further, the trial court's instruction in response to the jury's request was not coercive, and it did not foreclose the possibility that the testimony could be reviewed later. The trial court stated:

[W]hat I'm going to do is I'm going to ask you to go back in there and spend some time talking about what you heard. If you cannot reconstruct the testimony, if you really have some serious questions about what somebody said, then I will order the court reporter to start preparing that. But she's not going to do it until she starts going home tonight, because look at all those people I've got out there. So, she would possibly, if I pay her an expedited rate, have it for you on Monday.

There is nothing coercive about the court's instruction. The court specifically informed the jury that it would order the court reporter to start preparing the testimony if, after further discussions, the jury still had serious questions about what was said. Because the request was made on a Friday afternoon, it was not unreasonable to explain that the testimony, if needed, would not be available until the following Monday, the next scheduled day the court was open. The court's reference to paying the court reporter an expedited rate did not render the instruction coercive. The reference was not made in an attempt to justify the court's refusal to provide the testimony. Rather, it was made in the context of explaining that the court was willing to accommodate the jury by providing the testimony as early as Monday if it was really needed. We disagree with defendant's contention that the fact that the jury returned its verdict after approximately four hours is evidence that it was coerced into reaching a verdict. It is just as likely that, after further deliberations, the jury determined that it was able to reach a verdict

without the need to rehear the testimony. Accordingly, the court's jury instruction was not plain error.

V. DEFENDANT'S SENTENCES FOR FIRST-DEGREE CSC

Defendant lastly argues that the trial court erred by failing to sentence him below the mandatory 25-year minimum term prescribed by MCL 750.520b((2)(b) for the first-degree CSC convictions and that defense counsel was ineffective for failing to request a lesser sentence. We disagree.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of that issue is limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied the right to a fair trial. *Pickens*, 446 Mich at 338. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

MCL 750.520b(2)(b) provides:

For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

It is undisputed that both victims were less than 13 years of age and that defendant was substantially older than 17 years of age. Under these circumstances, MCL 750.520b(2)(b) required a mandatory minimum sentence of 25 years. Contrary to what defendant argues, the trial court did not have discretion to impose a lesser sentence. Thus, the trial court did not err in imposing minimum sentences of 25 years for defendant's first-degree CSC convictions, and defense counsel was not ineffective for failing to argue in favor of a lesser sentence.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Christopher M. Murray